Rationality In Arrest

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Introduction

Every sovereign empowers the law enforcement officers to exercise power over citizens to maintain the peace and to preserve social order. Since police encounters every possible combination of circumstances, it is impossible for the law or the police protocols to direct their actions in every situation. So, the police officers are granted a great deal of freedom to use their judgment regarding the kind of laws to enforce, at what time and against whom. Arrest is one of the measures employed by the enforcement officers to exercise their rights of maintaining the status quo in the society. However this particular power is widely misused for reasons pertaining to power and money.

Section 41 of CrPc provides circumstances under which the police officers can arrest.

Provisions given under section 41 of CrPC has been a matter of criticism for ages. It has been amended twice once in 2008 and in 2010 to mitigate the arbitrariness and the abuses associated with the section especially with respect to section498 a of IPC. Another reason for the amendment was to maintain a status quo between the internet of the society and the liberty of an individual. However, problem still persists.

The words mentioned in the section 41 of the code are **reasonable suspicion and reasonable believe** which are nothing but subjected to the reasoning and understanding of a particular human being at a particular time thereby causing uncertainty and arbitrariness with respect to arrest. Prior to the amendment, the officers could arrest a person as and when it came under the ambit of reasonable suspicion. However after the amendment they are still vested with the power to make arrest under the same provision albeit subjected to written documentation in the register. The amendments have been made in a such a subtle manner that the grey areas concerning the section has been kept intact. The moment it is subjected to the reasoning faculty of a man, it is bound to be influenced by his own understanding which can be flawed. Though it is generally contented that every case is bound by the peculiarity of its facts and circumstances hence the justification of reasonableness which cannot be objectified, yet the very facet of reasonableness is bound to vary and differ as per the intellectual capacity of an individual. How far would an officer invested with the power to arrest exercise his judgement with terms of reasonableness is a contention that the authors seek to discover.

Justice M N Venkatachaliah, chairman of the National Human Rights Commission and a former chief justice of India, has rightly pointed out that 60 per cent of all arrests in India are unnecessary and unjustifiable. It is indeed a sad commentary on the criminal justice system that lakhs of people are arrested in the country for no reason or with little justification. Apart from this, there are large-scale illegal detentions which constitute a regular feature and these are not brought on record. Many persons languish in jail as under-trials or remand prisoners or unable to find sureties even after bail is granted and remain in jail even for terms exceeding the maximum period of imprisonment for the offences allegedly committed by them. A good deal of money is passed on as outright corruption or speed money or reward at various levels of police, jail and other wings of administration. Not only in Tihar jail in Delhi but in the jails all over the country, under-trials constitute almost 90 per cent of the total jail population. The observations of justice M N Venkatachaliah that "60 per cent of the arrests are unnecessary and 43 per cent of the expenditure on jails are on prisoners who need not have been arrested at all" will, in fact, prove to be an underestimate, if we include the illegal detentions which are not shown as arrests and the number of prisoners who are not even produced before the courts on the excuse of want of escort or the repeated routine adjournments of criminal cases.[3]

Consistency of S.41 of The Code of Criminal Procedure vis-à-vis Fundamental and Human Rights:

Article 21 of the constitution of India declares that “no person shall be deprived of his life or personal liberty except according to procedure established by law”. The heading of the said Article is “Protection of life and personal liberty”.[4] Article 20 contains three guarantees, namely, (a) not to be convicted of an offence which was not in force or punishable at the time of the commission of the offence, (b) not to be prosecuted or punished for the same offence more than once and (c) not to be compelled to be a witness against himself.[5]

These are all the rights guaranteed to a person accused of an offence. Clause (1) of Article 22 declares that “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice”. Clause (2) of Article 22 is indeed more fundamental. It says “Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place

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[3] Criminal Justice System: A Framework for Reforms Author(s): S. R. Sankaran Source: Economic and Political Weekly, Vol. 34, No. 22 (May 29 - Jun. 4, 1999), pp. 13161320 Published by: Economic and Political Weekly Stable URL: http://www.jstor.org/stable/4408009

[4] Constitution of India, PART III ART 21

[5] Constitution of India, PART III ART 20

of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate”.[6]

Though Article 21 is worded in negative terms, it is well-established now that it has both a negative and an affirmative dimension, affirmative being states responsibility to ensure the fundamental right of each citizen. Fundamental rights can be both negatively and positively defined. The negative aspect of right entails the individuals are protected from unwanted intrusion by state. The positive right to privacy entails an obligation of states to remove obstacles for enforcement of this right.

A Constitution Bench of the Supreme Court examined the content of the expression ‘personal liberty’ in Article 21 in Kharak Singh v. State of U.P. Rajagopala Ayyangar J., speaking for the majority, said: “We shall now proceed with the examination of the width, scope and content of the expression ‘personal liberty’ in Article 21…. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that ‘personal liberty’ is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the ‘personal liberties’ of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, ‘personal liberty’ in Article 21 takes in and comprises the residue.”[7]

The minority opinion in the said decision, however, placed a more expansive interpretation on Article 21. They said:

“No doubt the expression ‘personal liberty’ is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression ‘personal liberty’ in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person’s fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned.” [8]

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[6] Constitution of India, PART III ART 22

[7] Kharak Singh v. State of U.P AIR 1963 SC 1295 (India).

[8] Ibid.

In Maneka Gandhi v. Union of India, 1978[9], Bhagwati J. held that the judgment in R.C. Cooper v. Union of India[10] has the effect of overruling the majority opinion and of approving the minority opinion in Kharak Singh.

In Bolling v. Sharpe, Warren, C.J. speaking for the U.S. Supreme Court observed: "Although the court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[11]

These words, though spoken in the context of the US Bill of Rights, have yet been relied upon in various decisions of the Supreme Court of India.

In Maneka Gandhi v. UOI, a Constitution Bench of the Supreme Court went into the meaning of the expression "procedure established by law" in Article 21. The Court held that the procedure established by law does not mean any procedure but a procedure which is reasonable, just and fair. In fact Article 19 and Article 14 were both read into Article 21 for this purpose. The following dicta from the said decision bears reproduction:

"the law must therefore now be taken to be well-settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, insofar as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article…. Now, if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex-hypothesi it must also be liable to be tested with reference to Article 14…. There can be no doubt that it (Article 14) is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic…. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non arbitrariness pervades Article 14 like a brooding omnipresence and the procedure

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[9] Maneka Gandhi v. Union of India AIR 1978 SC 597 (India).

[10]R.C. Cooper v. Union of India AIR 1970 SC 564 (India).

[11]Bolling v. Sharpe 347 U.S. 497 (1954)

contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied." (emphasis added)

Several jurists have opined, not without justification, that the effect of Maneka Gandhi is to practically import the concept of 'due process of law' from the American Constitution into our jurisprudence. Be that as it may, the fact remains that the procedure established by law which affects the liberty of a citizen must be right, just and fair and should not be arbitrary, fanciful or oppressive and that a procedure which does not satisfy the said test would be violative of Article 21. We have to examine the relevant provisions in the Criminal Procedure Code, 1973 (relating to arrest) from the above standpoint. [12]

The concept of 'human rights' is not of recent origin. The expression was first employed in the Declaration of United Nations signed by the Allied Powers on January 1, 1942.

The concept owes its origin, in western thought, to the Bill of Rights, 1689 which declared for the first time that "excessive bail ought not to be required nor excessive fine imposed, nor cruel and unusual punishment inflicted".[13]

The French Declaration on the Rights of Man and the Citizen also spoke of "freedom from arrest except in conformity with the law", in addition to "liberty, property, security and resistance to oppression" which were declared to be the natural and inalienable rights of man. [14]

The Declaration of United Nations dated January 1, 1942 stated, inter alia, "complete victory over their enemies is essential to defend life, liberty, independence and religious freedom and to preserve human rights and justice in their own lands as well as in other lands".

The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948 declared that no one shall be subject to arbitrary arrest, detention or exile (Article 9).[15]

Article 12 provided that the privacy, reputation and honour of every individual shall be protected by the State.[16]

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[12] Maneka Gandhi v. Union of India AIR 1978 SC 597 (India).

[13] Bill of Rights, 1869

[14] The French Declaration on the Rights of Man and the Citizen, 1789

[15] Universal Declaration of Human Rights, 1948 (Article 9)

[16] Universal Declaration of Human Rights, 1948 (Article 12)

Article 9(1) of the International Covenant on Civil and Political Rights 1966 declares, inter alia, that "every one has the right to liberty and security of person (and that) no one shall be subject to arbitrary arrest or detention". Clause (3) of Article 9 declares further that "any one arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that the persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial at any stage of the judicial proceedings and, should occasion arise, for execution of the judgment".[17]

Article 10(1) of the Covenant declares that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[18]

Article 17 says that the privacy, honour and reputation of an individual shall not be interfered with unlawfully. Article 2(2) of the Covenant creates an obligation upon the ratifying States to enact domestic legislation to give effect to the rights guaranteed by the Covenant. Article 3 creates a further obligation upon such States to ensure that the rights guaranteed by the Covenant are made available to all their citizens.[19]

The question of applicability of International Covenants, Treaties can be one that is put up and to answer that so far as human rights are concerned, the courts have been adopting a more progressive line and have declared that insofar as the rights declared in such international instruments are consistent with the fundamental rights guaranteed by Part Three of the Constitution, they can be read as facets of and to elucidate the content of the fundamental rights guaranteed by our Constitution vide PUCL v. UOI[20] and Vishakha v. State of Rajasthan[21]. In the first mentioned case, it is held: "For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such". To the same effect is the holding in the second case, where it is held: "Any international convention not inconsistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee".

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[17] The International Covenant on Civil and Political Rights 1966, Article 9(1)

[18] The International Covenant on Civil and Political Rights 1966, Article 10 (1)

[19] The International Covenant on Civil and Political Rights 1966, Article 3, 2(2), 17

[20] PUCL v. UOI 1997 SC 1203 (India).

[21] Vishakha v. State of Rajasthan 1997 (6) SCC 241 (India).

Indiscriminate exercise of the power to arrest

"Arbitrary and indiscriminate arrest is anathema to the rule of law of values of criminal justice"[22]

Section 41 of the CrPc charts down the provisions under which the police officer may arrest without a warrant issued by a magistrate. By virtue of this section, the police officers are expected to execute their power of arrest when there exist a "reasonable complain", "reasonable suspicion" or a "credible information" that the person under question has committed a cognizable offence punishable with a term less than seven years or it may extend to seven years.

However, this power to arrest should be used only when there is an absolute need to confine that individual and must not be exercised in a arbitrary, hasty, and unreasonable manner as generally done. Apart form exercising the faculty of reasonability, it is the duty to use the power of diligence while arresting. The general attitude in India, is to arrest first and then proceed with case, **Section 498A** cause for maximum misuse of this power of arrest.[23]

The problematic aspect of the indiscriminate employment of the right to arrest is explicitly contemplated in the case of [24] **Joginder Kumar v state of UP 1994,** where it is observed that the power of power arrest need to have a balanced approach.

"The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first the criminal or society, the law violator or the law abider"[25]

Similarly in the case of **Nandy Satpathi**[26] contemplated that the balance between the needed of the law enforcement machinery and at the same time shielding the citizens from its arbitrariness in furtherance of arrest is an area of problematic deliberation of the state.

Recommendation of commissions and the their effects

There had been constant recommendation by the various commission of India regarding the problematic clauses of section 41 and the amendments of 2008 and subsequent amendment of 2010 have been the result of those. Though the section have been amended twice, yet a history as to how it

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[22] LAW COMMISSION OF INDIA Report No.243 Section 489A.(August 2012) Pg 25

[23]ibid

[24] Joginder Kumar v State of UP and Ors AIR 1994 SC 1349 (India).

[25] ibid

[26] Smt. Nandini Satpathy v. P.L. Dani AIR 1978 SC 1025 (India).

evolved would contribute an added insight as to how the recommendations when eventually implemented by the two amendments still exhibit the gap between the administrative justice and the power of the enforcement officers that is yet to be bridged.

The law commission report on its 152nd report in 1994[27] on custodial crimes recommended four clauses to be inserted in the section 41. Firstly it recommended the insertion of clause 411(A) regarding the record of the arrest to be made in each arrest, secondly clause 41(A) regrading the notice of the appearance which have been inserted by the amendment of 2008. Thirdly, an insertion of a new section, 50 (A) regarding the intimation of the arrest to the family members of the person arrested and maintaining a custody memo and finally it recommended 57A pertaining to the duty of the magistrate to verify facts.

In 135th law commission report on women in Custody had recommended the insertion of a new section 450(B) that would exclusively deal with the arrest of women.

Similarly, 172 report on the review of Rape Law in India also recommended that a section of 46 should be added that would deal with the procedures of arrest regrading women. [28]

The amendment of the CrPc 2008, was the result of the 177th law commission report[29] where it in detail observed the arbitrariness of the section 41 with respect to arrest and how it infringes the constitutional rights of the citizens. It recommended that section 41A would be inserted in the section which would deal with the notice of appearance. 41B, regrading the arrest and the procedure of the arrest, Section 41 C regarding the control rooms and section 41D regarding the right of the person who is arrested to have an advocate at the time of the interrogation.

The Amendment, 2008 and 2010.

The amendment of 2008 was made accordingly and sections (A to D) was inserted in the section. However, the Code was again revised and amended in 2010. There were several speculations as to why was the amendment reckoned that soon. The objectives mentioned in the Bill of 2010 stated that[30] the law commission further suggested certain amendments and according to the new bill it would be

"compulsory for the police to record the reasons for making an arrest as well for not making an arrest in respect of a cognizable offence for which the maximum punishment is up to seven years."[31]

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[27] LAW COMMISSION OF INDIA. Report No.152 Custodial Crime.(August 1994) Pg 20

[28] LAW COMMISSION OF INDIA. Report No. 172. Review of Rape Laws.(March 2000) Pg 1

[29] LAW COMMISSION OF INDIA. Report No.177. Law Relating to Arrest.(December 2001) Pg 112

[30]Bill of the Lok Sabha.The Code of Criminal Procedure (Amendment) Bill No 29. (March 2010)

[31] ibid

Thus an amendment to amendment was made to the code. However, the expressions that still vest arbitrariness in terms of arrest on the enforcement officers have been evaded with meticulous calculations.

The sections that have been amended by 2010 stands as section 1(a) where it states that anyone who commits a cognizable under the presence of the police would be arrested, the police must record its reason for arresting a person and also state its reason and the 41(A) (1) where notice to be given by the police directing a person to appear have been changed from " the police officer may" to "shall".

Section 41, of the CrPc.

The primary concern of the paper to evaluate the unreasonableness of the section 41 would be, by analysing the section 1(b) (d) and (g). The present section reads as

"Any police officer may without an order from the magistrate and without an warrant arrest any person,

(b) against whom a reasonable complaint has ben made, or credible information has been received, or a reasonable suspicion exist that he has committed a cognizable offence punishable with a term which may be less than seven years or which may extend to seven years whether with or without

fine if the following conditions are satisfied.

(d) in whose possession anything is found which may reasonable be suspected to be stolen property and who may be reasonably suspected of having committed an offence with reference to such thing"[32]

Section (g) also contemplates situation where arrest would be made on the basis of reasonable suspicion, credible information and reasonable concern.

PERSISTENCE OF ARBITRARINESS

Reasonable suspicion, ***credible information*** and ***reasonable believe*** are aspects that are determined by the mental faculty and would vary depending on parameters like education, experience and knowledge of the given police.

Though it is an established principle that criminal liability differs according to facts and circumstances and each case is new, and therefore establishing an objective standard to fit in cases would be unreasonable, an objective standard of guidelines to exercise such subjective powers of cognitive faculty would make the process of arrest less subjective. Though judiciary have suggested through various case laws that the power to arrest based on reasonable suspicion and doubt, credible information should be exercised with fairness and justness, but far have these been followed. The non exhaustive nature of the words makes it easier for the police to exercise their power arbitrarily.

[32]The Code of Criminal Procedure. 1973

Though according to the present amendment it is mandatory that the police officers arresting on the above basis must clearly note down the same but in reality the verification and the accountability of those records is again a problematic area.

In an early case of 1967 in Barium Chemicals Limited V Company Law Broad[33], it was held that though facts are objective but the inference of the case is subjective.

In Arnesh Kumar V state of Bihar[34], guidelines have been that needs to be followed while exercising the power of arrest. Though it is pertinent to section 498 (A) of IPC which is again a very grey area where arbitrary and unseasonable arrests are made.

In the US probable cause refers to this similar understanding. The fourth amendment of the united states lays special emphasis on the fact that while arresting the law enforcement officers should depend on probable cause. However, probable cause unlike reasonable suspicion requires greater objective facts to support the reason to arrest.

In Bringer v United States 1949[35]it was held in the context of issuing warrant that probable cause would depend on the practical considerations of everyday life. However, reasonability of a prudent man is tainted by his intellectual quotient and practical experience. The reasonability of an officer belonging to a remote district would starkly be different from that of someone operating in the metros. Thus somewhere a need for an objective approach is hinted.

Suggestion:

Police Manual - The document acts as a fundamental guiding tool to the police officers and should be published in a language that is easily comprehensible by them such as regional language. Further adherence to the document must be maid compulsory and any deviation from the same in terms of the duties and procedures under the same shall be punishable with fine.

Sensitisation lectures – There should be periodical campaigns and skill development courses to upgrade the officers about the newest developments in the field of arrest with relation to approaches and methods. They should be upgraded about the international developments with respect to investigation. The intention should be to improve awareness among police officers by introducing them to statistics of arrested persons without any cause. Further the

[33]Barium Chemicals Limited V Company Law Broad. 1967 AIR 295 (India).

[34] Arnesh Kumar V state of Bihar 2014. 8 SCC 273 (India).

[35] Brinegar v. United States, 338 U.S. 160, 175 1949.

importance of liberty and life enshrined in Art. 21 should be enunciated. The concepts of criminal law such as Mens Rea(Guilty Mind) and Actus Reus (Guilty Act) shall be made understood to the constables, so that there is objectivity in the arrest procedure and certainty rather than it being arbitrary. There must be a mandatory training where they should be taught about the objective application of the terms such as “reasonable suspicion”, “credible information” and “reasonable believe.” in their regular routine of exercising the power to arrest.

Reports- It should be made mandatory to submit the reports of arrest to the magistrate and the magistrate after verifying it, must submit to the higher head. Scrutiny at various layers of criminal justice coupled with the supervision of administrative justice would render greater transparency to the system of criminal justice. Further Magistrates shall be instructed to visit monthly to the police stations and hold accountable people with an unusual record of arbitrary arrest, inspect and take action on the same.

Conclusion:

Despite the amendments, the section **41 of CrPc** is still clouded with ambiguities pertaining to the inexhaustive nature of the phrases, “reasonable believe”, “reasonable suspicion” and “credible information”[36]. Though the concern to objectify the phrases was observed in the 177th Law Commission Report, yet it was not mentioned as a recommendation.

There is no doubt about the fact that if the phrases are partially objectified, it would create several inconveniences for the powerful section of the population as the discretion of the enforcement officers to make arrests would be considerable curtailed. However, Salmond asserts that the object of law is to render justice and thus every measure must be taken that makes the criminal justice system more efficient in meeting the ends of justice.

[36]The Code of Criminal Procedure. 1973